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AUTHOR Gaziano, Cecilie
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ABSTRACT

Public opinion polls about freedom of speech issues during a 30-year period (1937-70) were compared with Supreme Court decisions for the same period to determine the effects of public sentiment on judicial decision making. Two-thirds of the decisions conformed to a constitutionality model (that the Court should always uphold the First Amendment regardless of majority public opinion). However, a public opinion model (that the Court should always heed public opinion in its decision making) explained the outcomes one-third of the time when one of two conditions obtained: either when at least 35% to 40% of the population supported free speech for political extremists, or when a low level of public opinion was in favor of free speech. Dominance of the public opinion model was greatly apparent during two periods of public hostility against Communists and during one period of strong public feeling against antiwar demonstrators. Further support of the public opinion model comes from a graph charting the flow of public opinion and Supreme Court decisions for a 22-year period; the shapes of both variables on the graph are similar, indicating that the direction of public opinion and the direction of Supreme Court decisions are related. (Author/RL)

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An Investigation of the Relationship Between Public Opinion and Supreme Court Decisions

Cecilie Gaziano
Ph.D. Student
University of Minnesota
School of Journalism and Mass Communication

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A fundamental proposition of democratic government is that it rests upon a foundation of public opinion. In theory, legislators represent the people as directly as possible and are guided by public opinion, since the populace is too numerous to consult directly. But how about the judicial branch--is there some relationship between public opinion and court decisions?

The purpose of this paper is to examine the relationship, if any, between public opinion poll data and decisions of the ultimate segment of the judicial arm of U. S. government, the Supreme Court, concerning one type of First Amendment issue.* The issue is freedom of expression for deviant political groups. The paper will explore whether or not Mr. Dooley was correct that, "th ' supreme court follows th' illiction returns."[1]

Park, an early communication scholar and sociologist, defined the public as a collectivity which can provide organized and consistent action as an orderly means of social control. The public is that group of people conscious of an issue and holding opinions on it, never achieving total unanimity, but usually bringing about a dominant consensus.[2] Agents of social control, according to Park, are 1) social unrest, shifting currents of opinion, 2) mass movements, which are currents of opinion with definite goals, and 3) social institutions, based upon mores and public opinion. Law belongs to the third category in his theory as an agreed upon, rational codification of public opinion.[3]

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*The First Amendment to the U. S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Public Opinion, Court Decisions, and Democratic Tradition

Legal scholars disagree about whether or not the high court should consider public opinion. For example, Choper calls judicial review "undemocratic," and states, "In the main, the effect of judicial review in ruling legislation unconstitutional is to nullify the finished product of the lawmaking process."[4] In contrast, Levy says that judicial review is a process which the people clearly support.[5] Rostow sees it as essential in such a large and heterogeneous society as the United States.[6]

An early public opinion scholar, Lowell, wrote that the Supreme Court functions in a particularly important way in democracy, to make unpopular decisions without a consensus of the majority.[7] Another public opinion scholar, Schettler, contends that the Supreme Court arbitrates conflicts between two or more public opinion groups; therefore, the views of one group within society will be enforced and another group will lose its voice, at least temporarily.[8]* Emerson, a noted legal scholar, sees tension between some areas of public opinion and the First Amendment. Therefore, in his view, mechanisms of modern government should foster public consensus by allowing a forum for expression of conflict as part of the democratic process.[9]

It is not the purpose of this paper to take a position on whether or not the high court should perform as a relatively autonomous body of last resort. Rather, the question here is: is there a relationship between

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*Schettler notes also that all laws are not consonant with majority public opinion. Some are perpetrated by special groups not representative of the majority, which have access to legislators. Further, some laws become outdated and out of kilter with public opinion, and therefore may be enforced selectively, or they may be nearly impossible to enforce (p. 456).

public opinion and court decisions?

Evidence for Relationship Between Public Opinion and Court Decisions

The Supreme Court is relatively independent of partisan politics and the Presidents who appoint its members. Although there is a considerable degree of structural autonomy in the relationships between the judiciary and governmental institutions generally, any public institution is in some measure subject to some influence of the demonstrated beliefs of the public at large. Historically, interpretation of the Constitution usually has been in light of the current social milieu. Further, public sentiment on many issues is constantly being measured. One would expect the Court to be aware of many of these indices. Some political scientists such as Dahl, Murphy, and Peltason believe that public opinion acts as a brake on judicial decision-making even if it is felt only indirectly by the justices.[10]*

However, compared to the legislative and executive branches of government, the Supreme Court has little public visibility. Dolbeare reports that public opinion is neither ". . .a controlling factor. . . (nor) a measure of the propriety of its decisions. . .The Court can take far-reaching action. . .without ever making a dent in the public consciousness."[11] Brown agrees that public opinion does not significantly

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*There is some evidence of relationship between the majority opinion of the people and court decisions in the U. S. and other countries. Besides Sheldon's evidence cited on the following page, there is anecdotal evidence that judges at several different levels in the judicial system are affected by community opinion (Brown, see footnote 10, pp. 12-14). Brown reports results of several studies of other systems: the U. S. S. R., West Germany, Sweden, Japan, Korea, and China, which incorporate structural arrangements (lay judges and citizen advisors) to take account of public opinion (pp. 5-12).

alter most decisions of both trial and higher courts, but he concludes that, "under certain conditions, . . .it is highly probable that the opinions of certain publics do act as significant input to courts."[12]

Brown suggests that among these conditions are high public anxiety and great amount of media attention, citing Mannheim's arguments in particular.[13]

Sheldon found support for the hypothesis that "in constitutional systems, the court of last resort will rule consistently with public opinion in crucial areas such as threats from subversive organizations."[14] He reviewed Supreme Court decisions between 1950 and 1961 and compared them with one 1954 Stouffer study question on the jailing of Communists (he looked at high courts and public opinion in three other countries also).[15] Sheldon concluded that shifts in conservativeness and liberalness of Court opinion during this period meshed with waves of public tolerance and intolerance of Communists. He also surmised that Court opinions in other volatile areas such as school desegregation and states' rights caused the public to focus with more hostility on the Communist case decisions.[16] Sheldon pointed to evidence by two justices that the high court felt intense public pressure during this period. In his dissent in the 1951 Dennis case, Justice Hugo Black wrote:

> . . .there is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[17]

Ten years later, Justice William O. Douglas commented bleakly:

> 'The most indifferent arguments,' Bismarck said, 'are good when one has a majority of Bayonets.' That is true when one has the votes. What we lost by majority vote today may be reclaimed at

> a future time when the fear of advocacy, dissent, and non-conformity no longer cast a shadow over us.[18]

The period that Sheldon examined was one of great public anxiety and attention to the Communist issue and one of much media publicity about the issue. A model predicted by knowledge of group psychology processes, conceptualizing a court as a task group is: the higher the tension, the greater the uncertainty--and the more likely the group is to seek the dominant outside referent, and the more likely that is to be public opinion.[19]

The hypothesis of this paper is suggested indirectly by Brown's and Mannheim's evidence and the group psychology model, and it is a more extensive test of Sheldon's hypothesis. The hypothesis is:

Decisions of the Supreme Court on freedom of expression for deviant political groups are related to public opinion on this issue.

METHOD

Public opinion polls involving freedom of speech issues for a 34-year period, 1937-70, were located in Public Opinion Quarterly, which reprinted results of polls conducted by eight organizations.[20] These issues were principally rights of Communists and Fascists, speeches which contain "dangerous ideas," criticism of government, and dissent against the Vietnam War.

Seventy-three Supreme Court cases were selected, which cases involved the right of members of deviant political groups to express themselves or the right of freedom of association and other related First Amendment activities. These were all of the cases that it was possible to locate for the same 34-year period. Decisions were analyzed for data on 1) ruling for or against freedom of expression or related First Amendment rights, 2) whether or not a lower court was reversed, and 3) breakdown of judges' positions on each case.

Decisions concerning civil rights or labor unions, areas which can embrace radical political views, were not examined because they involve other variables not included in this study. One labor case is included because several questions in the polls mention it specifically.[21]* All cases involving Communists were considered to be applicable to the paper because freedom of association was an issue implicit in each. Cases concerning conscientious objectors to war for religious reasons were omitted. The types of free speech issues specifically mentioned in the polls circumscribed the types of cases which could be included in the study.

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*Hague v. C.I.O., 307 U.S. 496 (1939).

RESULTS

Public Opinion Poll Data

Abstract freedom of speech was agreed upon almost unanimously (97 per cent) the last time such an issue was posed, in 1940, in the question, "Do you believe in freedom of speech?" Since then polls have concentrated on circumstances in which the public would limit freedom of speech.

The following polls are derived both from quota sampling, prevalent in the 1930's, 40's, and part of the 50's, and from the more accurate probability sampling used today. Results of the two types of sampling techniques are not directly comparable without compensation for the problems of quota samples. The major problem is under-representation of the lower education, income, and occupational groups.[22] The correction has not been made in the following graphs, but the reader may make a note of this. The data show that lower SES groups are less tolerant of free speech rights than higher SES groups, so the actual results may be more extreme than shown here.

First, Figure 1 shows percentages of persons answering two similar questions about rights of Communists to speak on the radio, between 1943-1964, the longest period for which data on similar questions are available. Between 1946-1954 support for free speech for Communist Party members dropped 35 points. It rose again in the middle 50's, then slumped. Later in this paper, information will be presented which indicates that the 50's may be divided into three periods according to intensity of public opinion.

Second, Figure 2 compares data for two slightly different questions concerning speeches on any topic between 1940 and 1954. Although the questions may not be comparable exactly, it appears that support for freedom of speech on any topic was much lower in the early 40's than in the mid-40's. There is a decline in the era of the McCarthy hearings (1953-54) with a slight upswing registered after the hearings ended.

Third, the number of persons favoring free speech for Communists or Fascists to the extent of their holding meetings and giving speeches declined substantially from 1938 (less than 35%) to 1941 (16-20%).* This supports the suggestion of a drop in support in the early 40's which appears in Figure 2.

Fourth, Erskine's data on freedom of speech with any limitations are summarized in Table 1. The percentages are averages for different polls for different years that varied in wording, allowing for a rough comparison. In general, approval of free speech with non-specific limitations was fairly stable between 1938 and 1960 (periods 1 and 2), but dropped a good bit between 1960 and 1970 (period 3). Toleration of freedom of expression for extremists showed greatest decline between periods 1 and 2, although a further decrease occurred in period 3. Explanation for the differences in these two trends may be difference in the subject of the available questions. For instance, questions tended to concern a) freedom of speech for Communists and b) speeches on any topic in periods 1 and 2 shown in the table. Questions predominantly dealt with criticism of government and demonstrations against the Vietnam War in period 3.

The poll data taken together indicate a relatively low consensus on free speech rights for extremists such as Communists and Fascists in 1938, with around 35-40% favoring such activities as their holding meetings.

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*Filtering questions were asked first. In 1938, 95% replied yes to, "Do you believe in freedom of speech?" Of these 35% said yes to, "Do you believe in it to the extent of allowing (Communists/Fascists) to hold meetings and express their views in this community?" In 1940, 97% replied yes to the filtering question, and 22% of these agreed to the second question. Both polls were conducted by Gallup. In 1941 OPOR reported 16%, 19% and 20% of three sample groups answering yes to essentially the same followup question; however, the filtering question was different (it is question 1 in Figure 2).

(Marching Nazis in uniform were tolerable to only 14% in 1937.) Amount of consensus for extremists' First Amendment rights climbed to a high of about 50% who would support broadcasting of speeches made by Communists (64% for speeches on any topic) in the mid-1940's. It plummeted between 1946* and the early 50's, marking the lowest points observed for the entire 30-year period. During these years which included the events both of the Korean War** and of the McCarthy hearings+, 14-16% would allow Communists to express views over the airwaves, 27% would let Communists make public speeches or have a book in the library,[23] and only 6% would tolerate Communists' teaching in schools.[24] Speeches on any topic were acceptable to 54% at this time. Public support increased perhaps six points for a short time after the end of the McCarthy era (for example, 56% favored speeches on any theme in November, 1954 after the hearings ended, and 20% did not oppose Communists' talks on the radio in 1956). But public approval sank again in the later 50's (for instance, only 17% would stand for Communists' airing views on the radio in 1957).

The events of the Vietnam War++ seem to have depressed public favor for the issue of extremists' rights just as public support began to rise again. Polls found 41% of the population supporting speeches "with danger-

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*The dates of World War II are 1939-45.

**Dates of the Korean War are 1950-53.

+The "McCarthy era" was 1953-54. The Permanent Investigation Sub-Committee of the Senate Committee on Government Operations (the "McCarthy Committee") began investigation of alleged spying at Fort Monmouth, N. J., in October 1953. Hearings were televised from April 22 through June 17, 1954. (Source: Dictionary of American History, rev. ed., (New York: Charles Scribner's Sons, 1976).

++U. S. involvement began in the Vietnam War in 1965 and peaked in 1968, the year of the Tet offensive. In 1975 the last American troops left Vietnam.

ous ideas" in 1962 and 18% permitting Communists to speak on the radio in 1964. A slight gain in regard for Communists' First Amendment rights seems to have been registered in the latter half of the decade. In 1965, 89% believed Communists to be harmful to American life (a more restrictive wording than "allowing meetings," etc.), and 85% expressed this view four years later.[25] At the same time, favorable public opinion declined on the subject of similar rights of war protesters. In 1965, "student demonstrators who engage in protest activities" were judged to be harmful by 65%; in 1969, 72% thought so.[26] Approximately 60% maintained approval of "peaceful war demonstrations" between 1965 and 1967. After that, favorable public opinion seems to have waned, but the amount is difficult to assess because questions available for that time used different wordings. Findings in 1968 were that just 14% agreed that war protesters had their rights taken away unlawfully, and that in 1969, 38% said that students have the right to protest against the war. The following year one poll reported 42% agreeing to criticism of government,* but only 21% accepting organized protest against the government.**

It is interesting to note that data for the early 1970's (from another source) indicate rising support for free speech rights of war dissenters and Communists. In 1973, 72% ranked Communists "harmful to American life," compared to the figures reported above (89% in 1965, 85% in 1969). Only 48% thought student demonstrators who engage in protest activities were

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*CBS NEWS (Telephone): "Do you think everyone should have the right to criticize the government, even if the criticism is damaging to our national interests?" (March 20, 1970) in Erskine, p. 490.

**Same poll: "As long as there appears to be no clear danger of violence, do you think any group, no matter how extreme, should be allowed to organize protests against the government?" Also from Erskine, p. 493.

harmful in 1973 compared to 65% and 72% in the same respective years). An "admitted Communist" had the right to speak, in the opinion of 52% polled in 1972 and 58% in 1974 (it was 27% in 1954). Those who would allow such a person to teach totaled 32% in 1972 and 42% two years later (recall that a mere 6% supported this in 1954).[27]

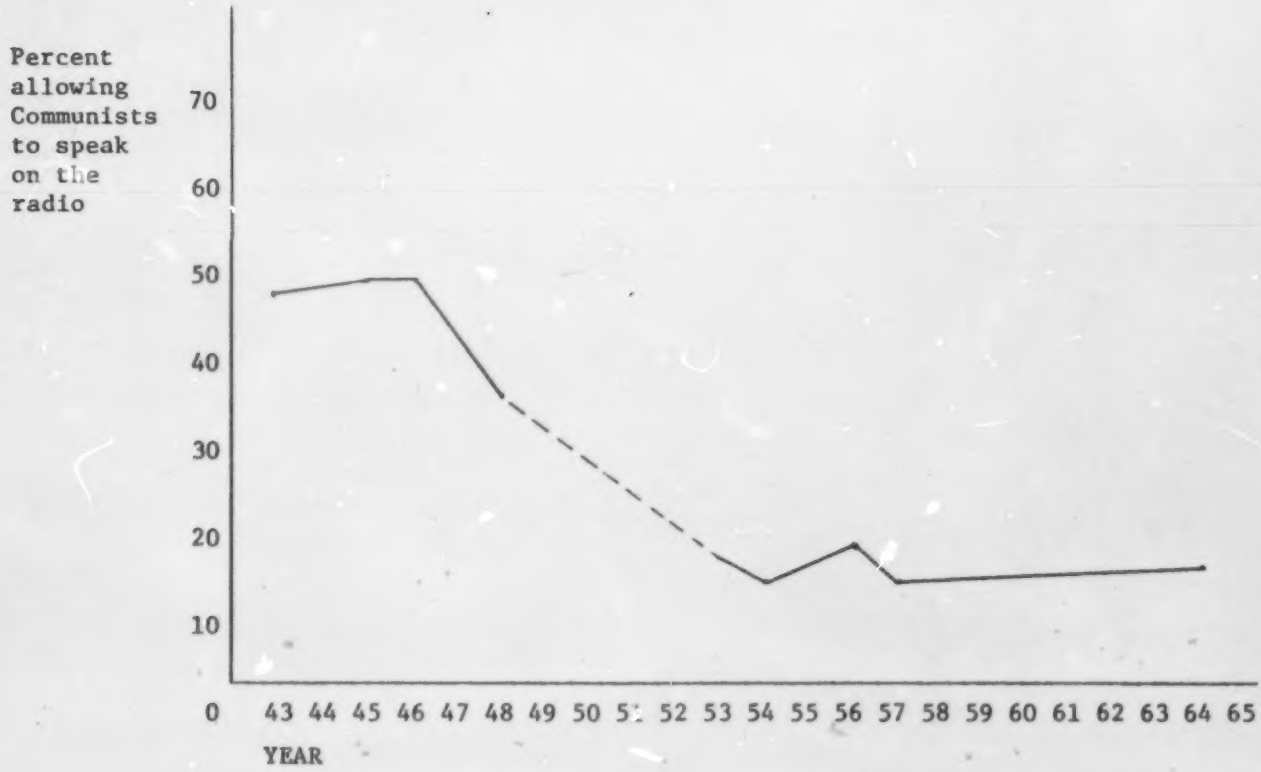

FIGURE 1: Percentage of respondents who would allow Communists to speak on the radio.*

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1. NORC: "In peacetime, do you think members of the Communist party in this country should be allowed to speak on the radio?"

	For complete freedom	Opposed, want limited	No opinion
1943 (November)	48%	40%	12%
1945 (November)	49	39	12
1946 (July 4)	49	39	12
1948 (April)	36	57	7

2. NORC: "Do you think members of the Communist Party in this country should be allowed to speak on the radio?"

	For complete freedom	Opposed, want limited	No opinion
1953 (November 25)	19	77	4
1954 (January 21)	14	81	5
1956 (January 26)	16	81	3
(December 28)	20	77	3
1957 (April 26)	17	80	3
1964 (January)	18	77	5

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*Source for Figure 1: Hazel Erskine, "The Polls: Freedom of Speech," 34 Public Opinion Quarterly 483, 487-489 (1970).

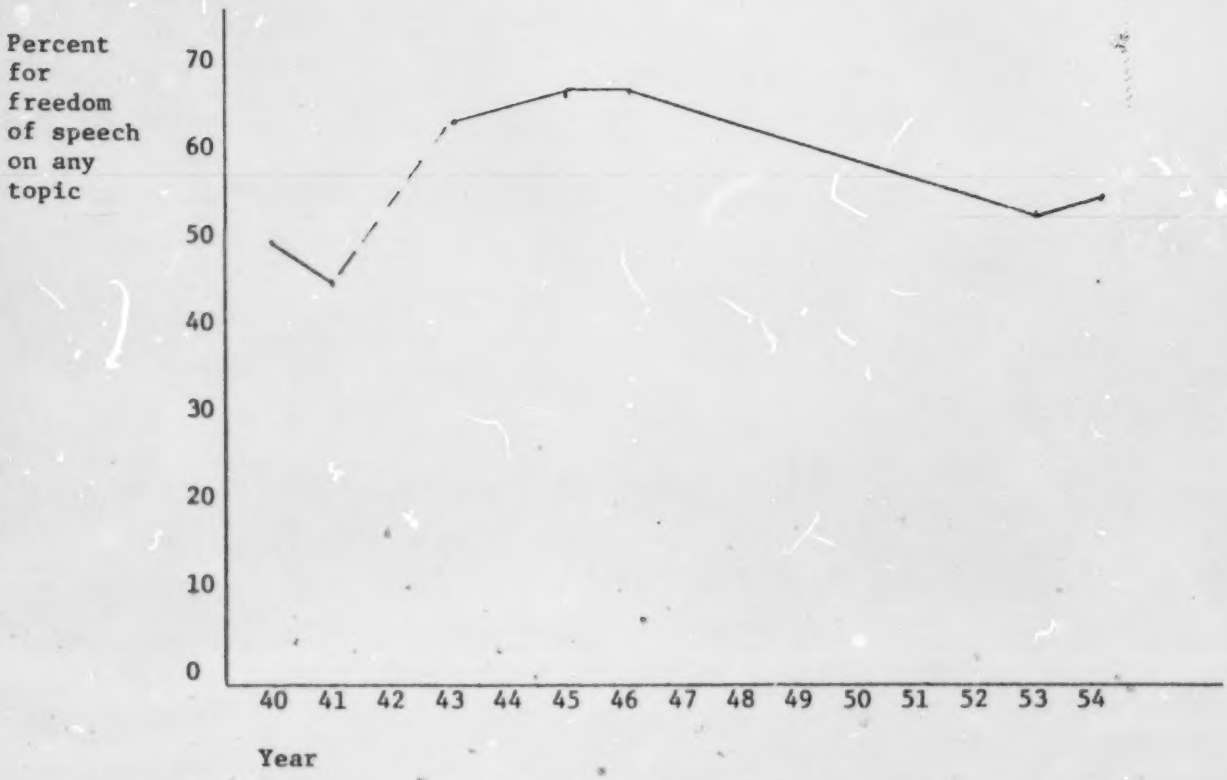

FIGURE 2: Percentage of respondents for freedom of speech on any topic.**

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1. ROPER (FORTUNE); OPOR: "Do you think that in America anybody should be allowed to speak on any subject any time he wants to, or do you think there are times when free speech should be prohibited or certain subjects or speakers prohibited?"

	For complete freedom	Opposed, want limited	No opinion
1940 (February) (ROPER)	49%	44%	7%
1941 (January 28) (OPOR)	44	53	3

2. NORC: "In peacetime, do you think people in this country should be allowed to say anything they want to in a public speech?"

	For complete freedom	Opposed, want limited	No opinion
1943 (November)	63	34	3
1945 (November)	64	32	4
1946 (July 4)	64	32	4
1953 (May 14) *	53	45	2
1954 (November 26) *	56	43	1

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*Note that a change in coding methods to allow qualified answers may account for most of the shift from 1946 to 1953, according to Erskine.

**SOURCE FOR FIGURE 2: Hazel Erskine, "The Polls: Freedom of Speech," 34 Public Opinion Quarterly 483, 486-488 (1970).

TABLE 1: Maximum percentages who have supported freedom of speech to differing lengths, divided roughly by decades.*

Maximum percentage believing in:	(Period 1) Before 1950	(Period 2) 1950-1960	(Period 3)** After 1960
Theoretical freedom of speech	97%	Not asked	Not asked
Freedom of speech with non-specific limitations	68	70%	61%
Freedom of speech for extremists	49	29	21

*SOURCE FOR TABLE 1: Hazel Erskine, "The Polls: Freedom of Speech," 34 Public Opinion Quarterly 483, 484 (1970). Reprinted in entirety.

**Periods in parentheses added.

Supreme Court Decisions

Information on Supreme Court rulings is summarized in Tables 2 and 3. Table 2 is included to show that Supreme Court decisions cannot be predicted from lower court rulings. It shows the number of "pro-free speech" decisions made during 1937-1970, compared to lower court decisions on the same cases. Sixty-seven per cent of Supreme Court decisions upheld freedom of speech, compared to only 10% of lower court rulings upholding free speech. The high court overturned 66% of the lower court decisions against free speech, contrasted with 29% of lower court rulings for free speech which were overturned.*

Table 3 presents the frequency of decisions upholding freedom of speech, reflecting also the division on the issue within the court. Decisions against freedom of expression are concentrated in the period between 1950 and 1961 when 22 out of a total of 24 decisions adverse to the First Amendment were made. The other two adverse decisions occurred in the Vietnam War era. Fourteen of the 22 decisions against free speech between 1950-61 were close (5-4 or evenly divided). In comparison, five decisions for free speech at this time were close. Two other close pro-free speech decisions occurred in the Vietnam era, (one concerning Communism and one centering on war protest), one was in 1959 (involving a "fascist" speech), and one was in 1937 (involving a Communist).

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*It cannot be determined from this data if the lower court decisions are an indicator of lower court positions on free speech issues or an indicator of which cases are appealed.

TABLE 2: Supreme Court decisions compared with lower court decisions for/against freedom of expression for political extremists.

		Lower Court		
		For FOE*	Anti-FOE*	
Supreme Court	For FOE*	5 (.07)	44 (.60)	49 (.67)
	Anti-FOE*	2 (.03)	22 (.30)	24 (.33)
		7 (.10)	66 (.90)	73 (1.00)

*NOTE: FOE = Freedom of Expression (for political extremists).

TABLE 3: Supreme Court decisions for and against freedom of expression for political extremists by year, showing number of cases within a year and whether or not vote was split within a decision.

	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70
N=49 For FOE*	8-0 5-4		5-2				6-3 9-0			7-0			5-4	8-0	5-3	8-0			8-0 8-0 6-3 7-2	6-3 5-4	7-1 6-2 6-1 5-2	5-4 7-1 5-4 6-3 6-3 6-2 7-1	5-4		5-4 9-0 9-0	5-2		6-3 7-2	5-4 9-0 5-2	9-0 6-3	5-4 7-2	6-3 9-0	7-2	9-0 9-0 9-0 5-3
Year	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70
Limiting FOE* N=24														3-3	4-4 6-2 5-4 9-0	5-4 6-2 6-3	5-2	6-3 7-2				5-4 5-4	5-4 6-3	5-4	5-4 5-4 5-4 5-4 5-4 5-4						7-2	7-1		

*FOE = Freedom of expression (for political extremists).

DISCUSSION

To assess whether or not public opinion had any impact on the decisions of the Supreme Court, the decisions were grouped into four periods of rulings upholding the First Amendment rights of extremists and three periods of decisions not upholding these rights, as shown in Table 4.

In period 1 (1937-49) when the seven cases occurring then were all decided in favor of the First Amendment, public opinion was variable, shifting from the somewhat low levels of 1937-42 to the relatively high levels (above 50%) of 1943-46, before dropping again to about the same initial level by 1948 and 1949. The Court began to rule against free speech rights of Communists in 1950-54, period 2, upholding such rights in only 21% of the 14 cases received in this period. Public opinion against Communists' rights of free expression was at an all time low in the history of polling. In period 3, 1955-57, all 11 cases received rulings favorable to the First Amendment, quite a switch from the previous years. Public opinion seems to have been supportive of this, although the upward swing as shown in Figure 1 is a small one. The Court changed its rulings again in period 4, 1958-61, when only half of the 22 cases decided then favored free expression. There is no poll data for this time, so no conclusions about public opinion can be made without consulting another source. Sheldon's analysis will be noted later. Again, the Court shifted direction, rendering rulings favorable to free speech in all eight cases occurring in period 5 (1962-66). Public opinion poll data indicate low support for freedom of speech initially, rising to relatively high levels for dissent against war. Communists remain relatively low in favor. Two out of six cases in period 6 (1967-68) went against the First Amendment.

Public feeling on the issue was rather favorable in 1967, as it had been in 1965, at least for war protesters, if not for Communists. Opinion in the next year might have been lower but it is not possible to say for sure, since a different question is the basis for comparison. Period 7, 1969-70, contains five decisions, all upholding the First Amendment. Public opinion at this point appears to have been relatively low, although the poll questions are not easily compared to those asked in the middle 60's. Public willingness to recognize free expression rights of Communists and war dissenters increased quite a bit in the early 70's.

The picture presented thus far by the poll data and the Court decisions is one of a Court endeavoring to sustain rights guaranteed by the First Amendment even when only four persons in ten sanction this guarantee.

More information about the years spanning 1950-61 (periods 2, 3, and 4) is provided by Sheldon. His historical analysis bolsters the suggestion of a rise in public endorsement of extremists' rights in period 3, and it illuminates the events that caused the Court twice to shift support for First Amendment rights of Communists:

> The differences between the Dennis[28] (1951) and Yates[29] (1957) cases were sharp even though majority justices claimed to be following precedent. Another reversal of direction was exemplified between Yates and Scales[30] (1961).[31]*

Sheldon cites Parsons:

> It seems fair to say that the 'Communism in government' could not have been made a central issue as early as 1948, that in 1952 it was moving into the 'gateway,' but that by 1956 it had become a dead issue.[32]

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*Dates of cases added to quotations.

TABLE 4: Supreme Court decisions on freedom of expression for political extremists grouped according to whether or not freedom of speech was upheld.

Decisions upholding freedom of speech	Decisions not upholding FOE*	No. of cases upholding FOE* out of total in the period	Percentage of cases upholding FOE* for period	Assessment of public opinion during the time period
1937-49 (period 1)		7/7	100%	1937-42 relatively low public support (35-40% generally) 1943-46 reasonably high public support (50-64%) 1947-49 relatively low again
	1950-54 (period 2)	3/14	21%	Lowest recorded levels (6-27%), depending upon activity asked about
1955-57 (period 3)		11/11	100%	Support low but slight increase (about 5-6 points)
	1958-61 (period 4)	11/22	50%	No poll data available. Sheldon's evidence indicates low public approval.
1962-66 (period 5)		8/8	100%	Poll data indicate low but rising support for dissenters, low favor for Communists.
	1967-68 (period 6)	4/6	67%	Support seems fairly high for dissenters in 1967 but lower in 1968. Low favor for Communists.
1969-70 (period 7)		5/5	100%	Data are inconclusive. Increasing tolerance for dissenters and Communists recorded later in 1972-74.

*FOE = freedom of expression.

Sheldon added that the tide of public pressure had abated enough so that the Supreme Court felt it could hand down its liberal decision in Yates (1957). However, the day that Yates, Watkins,[33] Sweezy,[34] and Service[35] rulings were rendered became known as "Red Monday" to critics of the Court.[36] A number of groups ("Southern racists, states' rightists, lawyers, many members of the business community, local law enforcement agencies, the F. B. I. and anti-Communists") combined forces in opposition unforeseen by the Court, and they worked through Congress to make their feelings known to the Court.[37]

> The Court capitulated. In order to break the coalition, the justices pulled back in that area which provided the rallying point for the many diverse elements of American society--communism and subversion. Uphaus[38] (1959), Barenblatt[39] (1959), Scales and Control Board[40] (1961) were decisions of retreat. . .*
>
> The retreat of 1958-61. . .constituted a significant ideological departure from the forward-looking position assumed by the Court in its opinions during the 1956-57 term.
>
> . . .Despite the continuing argument for curbing the Court, the retreat of 1958-61 was fairly successful in removing from the arena of constitutional politics the one issue--communism--upon which all of the Court's opponents could agree.[41]

Further information is provided by an examination of amount of unanimity within the Court. There are 23 decisions (32% of the total) in which the Court was closely divided (5-4) or evenly divided.**

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*Dates of cases added to quotations.

**During 1955-57 when public heat had lessened, Burton and Harlan tended to divide their support, and Frankfurter consistently favored freedom of expression. During the second period of public opposition, 1958-61, the same three were most affected, this time withdrawing their support. Three other members of the Court (Reed, Jackson, and Stewart) show different voting patterns depending upon which period is examined, a time of higher public favor for free speech (when they voted for it) or a time of low public support (when they voted against it). Further, Harlan and Stewart changed

Sixty per cent of these were decided contrary to the First Amendment during two of the periods of strongest public feeling against extremists (periods 2 and 4). This indicates that the Court felt a great deal of strain when its members rendered these decisions. Less strain is indicated in period 2 (1950-54) when 36% of the decisions in this period not upholding the First Amendment were closely or equally divided. Much greater strain is depicted in period 4, 1958-61, when 91% of decisions made then not reinforcing First Amendment rights were close. It appears that when the Court's holdings were adverse to the First Amendment, even though public opinion buttressed them, these decisions were difficult for the Court to make. Of all rulings not upholding free speech, 58% were made by a closely or evenly divided Court.

There are much fewer close decisions upholding the right of free expression--nine. Six of these occurred in a period of strong public disapproval of Communists (four in period 4, one in 1937, and one in 1949). The other three occurred in times of low but increasing public favor for Communists' rights.

The last evidence to help determine whether or not there is a relationship between public opinion and Supreme Court decisions is furnished in Figure 3. This is Figure 1 compared with a graph of the average per-

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support again in 1967-68, voting against free speech. These six (Burton, Harlan, Frankfurter, Reed, Jackson, and Stewart) may be termed "swing men," because they switched their positions in times of strong public sentiment against free speech. Taking consistent positions for freedom of expression were Douglas, Black, Warren, and Brennan. Consistently voting against it were Clark, Vinson, Minton, and Whittaker. The latter four plus the six "swing men" account for the change in Court voting behavior against freedom of expression for Communists. Truman appointees had strongest impact on Court conservativism toward free speech since none of them proved to be pro-free speech for extremists. The Roosevelt years produced three "swing men" and two who were pro-free speech, and the Eisenhower years contributed two "swing men," one opposed to free speech, and two for it.

centages of justices voting for freedom of expression in individual cases. The Court's graph is based on computations of five year "moving averages." Although there is a problem of lack of data for some individual years, the shape of the graph is very much like the shape of the graph of public opinion. The distance between the Court's and the public's graphs reveals a Court more protective of the First Amendment than the public. The shape, however, suggests a Court altering its decisions according to influence of public opinion.

More information about the public is obtained by looking at poll data breakdown by education.* The graphs of those with high school and grammar school educations (not shown) parallel the average for the public as a whole, but fall below that line. However, that for the college-educated parallels the average for the public as a whole above the line until 1957. In that year, an eight point increase in favor for free speech was reported for college-educated people. In contrast, those with grammar school and high school educations declined in support--six points and three points, respectively. The Court appears to have been more in tune with highly educated persons than with the lesser educated. This is logical, since members of the Court are more likely to interact with "elites" more than non-elites both in their professional and in their personal lives.

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*Data to compare with Figure 3 (from Erskine, pp. 488-489):

For Complete Freedom

	College	High School	Grammar School
1953	26	19	17
1954	20	11	13
1956 (Jan.)	26	13	13
1956 (Dec.)	28	19	16
1957	36	16	10
1964	--	--	--

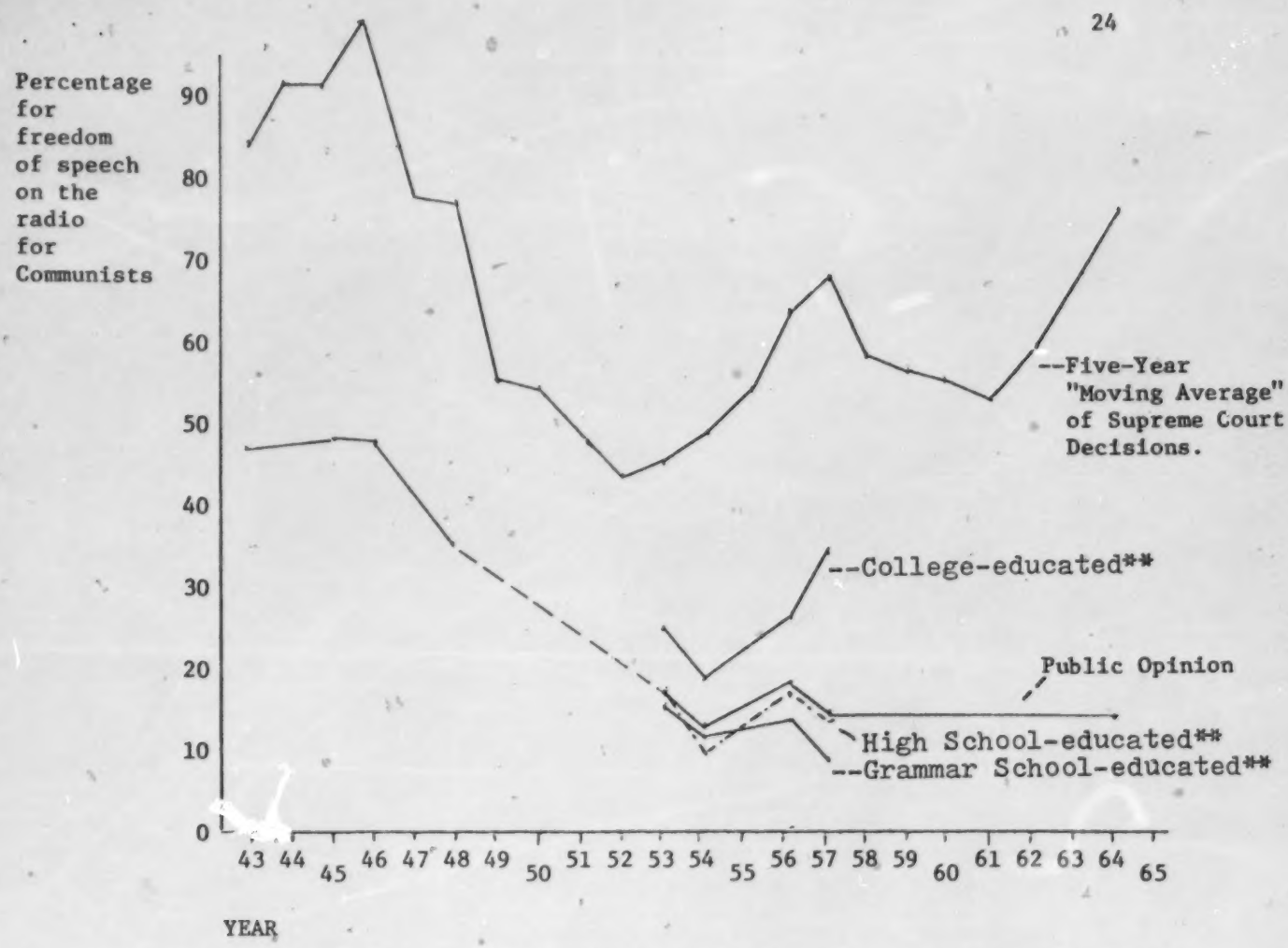

FIGURE 3: Percentage of justices for freedom of speech compared with public opinion as shown in Figure 1.*

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1. NORC: "In peacetime, do you think members of the Communist party in this country should be allowed to speak on the radio?"

	For complete freedom	Opposed, want limited	No opinion
1943 (November)	48%	40%	12%
1945 (November)	49	39	12
1946 (July 4)	49	39	12
1948 (April)	36	57	7

2. NORC: "Do you think members of the Communist Party in this country should be allowed to speak on the radio?"

	For complete freedom	Opposed, want limited	No opinion
1953 (November 25)	19	77	4
1954 (January 21)	14	81	5
1956 (January 26)	16	81	3
(December 28)	20	77	3
1957 (April 26)	17	80	3
1964 (January)	18	77	5

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*Justices' percentages were calculated from Table 3. Then a five-year "moving average" was computed, using these percentages.

**See data in footnote on p. 23.

Support for the Hypothesis

Decisions of the Supreme Court involving freedom of speech for deviant political groups are related to public opinion on this issue.

First, there is evidence that decisions rendered during three periods (2, 4, and 6, shown in Table 4) during which the Supreme Court did not uphold the First Amendment, were greatly influenced by public opinion. The poll data for period 2 strongly indicate the working of public feeling upon the Court's rulings. Sheldon's evidence further argues for great influence of public opinion in periods 2 and 4. It is also likely that the comparatively larger number of cases in these two periods was partially attributable to intense public feeling. The two decisions in period 6 which did not uphold the First Amendment seem to conform to public sentiment as well. The 1967 decision not upholding free speech rights of Communists is supported by poll data for 1965 and 1969 showing strong public feeling against free speech rights of Communists. The 1968 case decided contrary to the First Amendment, involving war dissent, had elements of violence in it (draft card burning and incitement of onlookers) so that it is likely that public opinion, which was against dissent with violence, sanctioned this ruling. Therefore, for periods 2, 4, and 6, about a third of the time period studied, strong argument can be made for the influence of public opinion upon Supreme Court decisions.

Second, the working of public opinion is seen as well in periods 1, 3, and 5, although the Court was able to uphold the First Amendment when as many as six persons in ten opposed freedom of speech for extremists. For about a third of period 1, favorable opinion toward deviants' rights of free speech tended to coincide with favorable Court rulings (the middle of the period). Some strain within the Court in upholding free speech is shown in one case at the beginning of period 1 and in one case at the end when these two decisions were close. This suggests that some members of the Court were responding to the unfavorable climate of opinion at these two times. In period 3 the Court upheld the First Amendment in the face of public opposition, but public favor for free speech rights of political dissidents was increasing at this time. In particular, high SES persons were the most supportive of such an increase, and such people are also the most likely to interact personnally with Supreme Court members. They constitute a particular public with whom the Court seems to have been most in tune. In period 5 the same situation as that in period 3 existed--decisions upholding free speech were made during a time of low but rising public favorability toward free speech. (It is possible that the same situation again existed in period 7, but this cannot be known for certain since the available poll data are inconclusive. It is likely that public support was increasing because considerably higher levels were recorded in 1972-74.) Therefore, in two periods, if not three, upward swings in public favorability, although at low levels, seemed to provide enough impetus to back the Court's decisions for freedom of speech. It

also appears that the Court felt more comfortable in handing down these decisions because there were only four close decisions during periods 1, 3, and 5 (none in 7). This compares with the large number of close decisions in periods 2 and 4 when public hostility ran high and many decisions in either direction but especially against the First Amendment were close ones. Thus, for at least three of these time spans a case can be made for influence of public opinion when a) there was an increase in the number of persons willing to support free speech during a time of low tolerance, which seemed to bolster favorable decisions, or b) at least 35-40% of the public favored freedom of speech--allowing the Court to uphold free expression, but under stress since some decisions at these times were close. When fewer than four in ten approved of free speech for all, which was the case in periods 2 and 4 (and 6 in the case of Communists if not for war dissenters), then the Court was much more likely to rule against free speech and its decisions were much more likely to be close ones.

Finally, graphs of public opinion as measured by polls and of Supreme Court decisions for a 22-year span, almost 65% of the time under study (shown in Figure 3) also provide strong evidence that public opinion influenced Court decisions because the shapes of both graphs are similar. (It is possible that knowledge of poll findings, which were published, influenced the justices.)

Because of the persuasive evidence of public opinion influence during periods 2, 4, and 6, a third of the time period studied, corroborated by the graphs covering almost two-thirds of the time, and the evidence that public opinion played a part in decisions rendered during periods 1, 3, and 5, it is concluded that the hypothesis is supported.

CONCLUSION

This paper examined whether or not there is a relationship between public opinion as measured by polls and decisions of the Supreme Court, concerning one type of First Amendment issue--freedom of speech for deviant political groups.

Seventy-three Court cases involving freedom of expression for political extremists during 1937-70 were compared with public opinion poll data for the same period. The decisions were divided into periods during which free speech was upheld and periods when it was not. These periods were then compared with the poll data.

Strong influence of public opinion was seen in three periods covering 11 years, and some influence was determined to exist in three other periods covering 21 years when either of two situations existed: a) majority public opinion supporting free speech seemed to match decisions favorable to free speech, or b) a low level of public favorability was rising, which seemed to bolster decisions upholding the First Amendment. (No firm conclusion could be drawn for a seventh period, although it is likely that condition "b" above applied during this two-year period.) In addition, when the flow of public opinion and of Court decisions was charted for a 22-year span, the shapes of both graph lines were similar, indicating that the two are related.

For these reasons, it is argued in this paper that the hypothesis is supported--that decisions of the Supreme Court involving freedom of speech for deviant political groups are related to public opinion on this issue.

FOOTNOTES

[1]Finley Peter Dunne, The World of Mr. Dooley (New York: Collier Books, 1962), p. 89, cited in Charles H. Sheldon, "Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems," 20 The Western Political Quarterly 341, 360 (1967).

[2]Robert E. Park and Ernest W. Burgess, Introduction to the Science of Sociology, Rev. 3rd Ed. (Chicago: University of Chicago Press, 1969), 38.

[3]Ibid., pp. 786 and 799.

[4]Jesse Choper, in William A. Lockhart, Yale Kamisar, and Jesse H. Choper, eds., Cases and Materials on Constitutional Rights and Liberties, 4th Ed. (St. Paul: West Publishing Co., 1975), p. 15.

[5]Leonard Levy, cited in Lockhart et al, ibid., p. 16.

[6]Eugene Rostow, cited in Lockhart et al, ibid.

[7]A. Lawrence Lowell, "Public Opinion," in Bernard Berelson and Morris Janowitz, eds., Reader in Public Opinion and Communication, 2nd Ed. (New York: The Free Press, 1966), p. 23.

[8]Clarence Schettler, Public Opinion in American Society (New York: Harper & Bros., Publishers, 1960), p. 457.

[9]Thomas I. Emerson, The System of Freedom of Expression, New York: Vintage, 1970, p. 53.

[10]Robert A. Dahl, Pluralist Democracy in the United States (Chicago: Rand McNally & Co., 1967), p. 156; Walter F. Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964), p. 20; Jack W. Peltason, Federal Courts in the Political Process (New York: Random House, 1955, p. 246. Dahl, Murphy, and Peltason are cited in Don W. Brown, "Public Opinion and Judicial Decision-Making," paper presented to the Annual Meeting of the American Political Science Association in Washington, D. C., September 5-9, 1972, p. 20.

[11]Kenneth M. Dolbeare, "The Public Views the Supreme Court," in Herbert Jacob, ed., Law, Politics and the Federal Courts (Boston: Little, Brown & Co., 1967), p. 209; cited in Brown, ibid., p. 1.

[12]Brown, op, cit., p. 20. (At note 10.)

[13]Hermann Mannheim, "Criminal Law and Penology," in Morris Ginsberg, ed., Law and Opinion in England in the 20th Century, cited in Brown, ibid., p. 14.

[14]Sheldon, op. cit. (at note 1).

[15]Ibid., pp. 343-344.

[16]Ibid., p. 347.

[17]Dennis v. U. S., 341 U. S. 494 (1951), 581, cited in Sheldon, ibid., p. 345.

[18]Scales v. U. S., 367 U. S. 203 (1961), 275, cited in Sheldon, ibid.

[19]Model suggested by Phillip J. Tichenor in a conversation on June 1, 1977.

[20]Hazel Erskine, "The Polls: Freedom of Speech," 34 Public Opinion Quarterly 483-496 (1970).

[21]Ibid., p. 485.

[22]Norval D. Glenn, "Problems of Comparability in Trend Studies with Opinion Poll Data," 31 Public Opinion Quarterly 82, 83 (1970).

[23]Hazel Erskine and Richard L. Siegel, "Civil Liberties and the American Public," 31 (No. 2) Journal of Social Issues 13, 15 (1975).

[24]Ibid.

[25]Ibid., p. 26.

[26]Ibid.

[27]Ibid., p. 15.

[28]Dennis v. U. S., supra. (at note 17).

[29]Yates v. U. S., 354 U. S. 298 (1957).

[30]Scales v. U. S., supra. (at note 18).

[31]Sheldon, op. cit., pp. 344-345.

[32]Eugene Burdick and Arthur J. Brodbeck, eds., American Voting Behavior (Glencoe: Free Press, 1959), p. 110; cited in Sheldon, op. cit., pp. 345-346.

[33]Watkins v. U. S., 354 U. S. 178 (1957).

[34]Sweezy v. New Hampshire, 354 U. S. 234 (1957).

[35]Service v. Dulles, 354 U. S. 363 (1957).

[36]Walter F. Murphy, Congress and the Court (Chicago: University of Chicago Press, 1962), p. 100; cited in Sheldon, op. cit., p. 348.

[37]Sheldon, ibid., p. 348.

[38]Uphaus v. Wyman, 360 U. S. 72 (1959).

[39]Barenblatt v. U. S., 360 U. S. 109 (1959).

[40]Communist Party v. Subversive Activities Control Board, 367 U. S. 1 (1961).

[41]Sheldon, op. cit., pp. 349-350.

APPENDIX: TABLE OF CASES

NOTE: Cases were tried as First Amendment cases or are related to it.

Notation in parentheses of "Communist case" refers to fact that case concerns Communism as an issue in some form; defendant or plaintiff is not necessarily a Communist.

Adler et al. v. Board of Education of City of New York 342 U.S. 485, 72 S.Ct.380	(Communist case)	1952
Aptheker v. Secretary of State 378 U.S. 500, 84 S.Ct. 659	(Communist case)	1964
Bachellar v. Maryland 397 U.S. 564, 90 S.Ct. 1312	(Vietnam War dissent)	1970
Baggett et al. v. Bullitt et al. 377 U.S. 360, 84 S.Ct. 1316	(Communist case)	1964
Bailey v. Richardson 341 U.S. 918, 71 S.Ct. 669	(Communist case)	1951
Barenblatt v. United States 360 U.S. 109, 79 S.Ct. 1081	(Communist case)	1959
Barsky v. Board of Regents of University of State of New York 347 U.S. 442, 74 S.Ct. 650	(Communist case)	1954
Beilan v. Board of Education, School District of Philadelphia 357 U.S. 399, 78 S.Ct. 1317	(Communist case)	1958
Blau v. United States 340 U.S. 159, 71 S.Ct. 223	(Communist case)	1950
Bond et al. v. Floyd et al. 385 U.S. 116, 87 S.Ct. 339	(Vietnam War dissent)	1966
Braden, v. United States 365 U.S. 431,	(Communist case)	1961
Brown--United States v. Brown 381 U.S. 437, 85 S.Ct. 1707	(Communist case)	1965
Carlson v. Landon 342 U.S. 524, 72 S.Ct. 525	(Communist case)	1952
Communist Party v. Subversive Activities Control Board 367 U.S. 1,	(Communist case)	1961

Appendix continued

Cramp v. Board of Public Instruction 368 U.S. 278, 82 S.Ct. 277	(Communist case)	1961
Dayton v. Dulles 357 U.S. 144 78 S.Ct. 1127	(Communist case)	1958
DeGregory v. Attorney General of New Hampshire 383 U.S. 825, 86 S.Ct. 1148	(Communist case)	1966
DeJonge v. State of Oregon 299 U.S. 353, 57 S.Ct. 255	(Communist case)	1937
Dennis v. United States 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137	(Communist case)	1951
Deutch v. United States 367 U.S. 456,	(Communist case)	1961
Dombrowski v. Pfister 380 U.S. 479, 85 S.Ct. 1116	(Communist case)	1965
Douds--American Communications Assn. v. Douds 339 U.S. 382, 70 S.Ct. 674	(Communist case)	1950
W.E.B. DuBois Clubs of America v. Clark 389 U.S. 309,	(Communist case)	1967
Emspak v. United States 349 U.S. 190, 75 S.Ct. 687	(Communist case)	1955
First Unitarian Church of Los Angeles v. County of Los Angeles 357 U.S. 513, 78 S.Ct. 1352	(Communist case)	1958
Galvan v. Press 347 U.S. 522, 74 S.Ct. 737	(Communist case)	1954
Garner v. Board of Public Works 341 U.S. 716, 71 S.Ct. 909	(Communist case)	1951
Gerende v. Board of Supervisors of Elections of Baltimore City 341 U.S. 56, 71 S.Ct. 565	(Communist case)	1951
Gutknecht v. United States 396 U.S. 295, 90 S.Ct. 506	(Vietnam War dissenter)	1970
Hague v. Committee for Industrial Organization 307 U.S. 496, 59 S.Ct. 954	("Radicals" meeting)	1939
Harisiades v. Shaughnessy 342 U.S. 580	(Communist case)	1952
Herndon v. Lowry 301 U.S. 242, 57 S.Ct. 732	(Communist case)	1937
Jencks v. United States 353 U.S. 657, 77 S.Ct. 1007	(Communist case)	1957

Appendix . continued

Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123	(Communist case)	1951
Kent v. Dulles 357 U.S. 116, 78 S.Ct. 1113	(Communist case)	1958
Keyishian v. Board of Regents of the University of the State of New York 385 U.S. 589, 87 S.Ct. 675	(Communist case)	1967
Killiam v. United States 368 U.S. 231, 82 S.Ct. 302	(Communist case)	1961
Konigsberg v. State Bar of California I 353 U.S. 252, 77 S.Ct. 722	(Communist case)	1957
Konigsberg v. State Bar of California II 366 U.S. 36, 77 S.Ct. 722	(Communist case)	1961
Lerner v. Casey 357 U.S. 468, 78 S.Ct. 1311	(Communist case)	1958
Lovett--United States v. Lovett (Watson, Dodd) 328 U.S. 303, 66 S.Ct. 1073	(Communist case)	1946
Maisenberg v. United States 356 U.S. 670, 78 S.Ct. 960	(Communist case)	1958
Noto v. United States 367 U.S. 290	(Communist case)	1961
Nowak v. United States 356 U.S. 660, 78 S.Ct. 955	(Communist case)	1958
O'Brien--United States v. O'Brien 391 U.S. 367, 88 S.Ct. 1673	(Vietnam War dissent)	1968
Oestereich v. Selective Service System, Local Board No. 11, Cheyenne, Wyo. 393 U.S. 233, 89 S.Ct. 414	(Vietnam War dissent)	1968
Pennsylvania v. Nelson 350 U.S. 497, 76 S.Ct. 477	(Communist case)	1956
Quinn v. United States 349 U.S. 155, 75 S.Ct. 668	(Communist case)	1955
Robel--United States v. Robel 389 U.S. 258, 88 S.Ct. 419	(Communist case)	1967
Rumely--United States v. Rumely 345 U.S. 41	(Communist case)	1953

Appendix - continued

Russell v. United States 369 U.S. 749	(Communist case)	1962
Sacher v. United States 356 U.S. 576, 78 S.Ct. 842	(Communist case)	1958
Scales v. United States 367 U.S. 203, 81 S.Ct. 1469	(Communist case)	1961
Schact v. United States 398 U.S. 58, 90 S.Ct. 1555	(Vietnam War dissent)	1970
Schneider v. Smith 390 U.S. 17, 88 S.Ct. 682	(Communist case)	1968
Schneiderman v. United States 320 U.S. 118, 63 S.Ct. 1333	(Communist case)	1943
Schware v. Board of Bar Examiners of the State of New Mexico 353 U.S. 232, 77 S.Ct. 752	(Communist case)	1957
Seeger--United States v. Seeger, (U.S. v. Jakobson, Peter v. United States) 380 U.S. 163, 85 S.Ct. 850	(Conscientious objector)	1965
Service v. Dulles 354 U.S. 363, 77 S.Ct. 1152	(Loyalty questioned)	1957
Slochower v. Board of Higher Education of the City of New York 350 U.S. 551, 76 S.Ct. 637	(Communist case)	1956
Speiser v. Randall 357 U.S. 513,	(Communist case)	1958
Sweezy v. New Hampshire 354 U.S. 234, 77 S.Ct. 1203	(Communist case)	1957
Taylor v. Mississippi (Benoit v. Missippi, Cummings v. Missippi) 319 U.S. 583, 63 S.Ct. 1200	(Criticism of government)	1943
Terminiello v. City of Chicago 337 U.S. 1, 69 S.Ct. 894	("Fascist" case)	1949
Tinker v. Des Moines Independent School District 393 U.S. 503, 89 S.Ct. [illegible]	(Vietnam War dissent)	1969
Uphaus v. Wyman I 360 U.S. 72, 79 S.Ct. 1040	(Communist case)	1959
Uphaus v. Wyman II 364 U.S. 388,	(Communist case)	1960

Appendix . continued

Vitarelli v. Seaton 359 U.S. 535	(Communist case)	1959
Watkins v. United States 354 U.S. 178, 77 S.Ct. 1173	(Communist case)	1957
Welsh v. United States 398 U.S. 333, 90 S.Ct. 1792	(Conscientious objector)	1970
Wieman v. Updegraff 344 U.S. 183, S.Ct. 215	(Communist case)	1952
Wilkinson, v. United States 365 U.S. 399, S.Ct.	(Communist case)	1961
Yates v. United States 354 U.S. 298, 77 S.Ct. 1064	(Communist case)	1957